No. 12810

IN THE

United States
Court of Appeals
FOR THE NINTH CIRCUIT

F. E. NEMEC,
Appellant,

UNITED STATES OF AMERICA,
Appellee.

No. 12810

On Appeal from the District Court of the United States, for the Eastern District of Washington

BRIEF FOR THE APPELLEE

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN,
Assistant United States Attorney
Attorneys for Appellee

INDEX

TABLE OF CASES

No. 12810

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

F. E. NEMEC,
Appellant,

UNITED STATES OF AMERICA,
Appellee.

No. 12810

On Appeal from the District Court of the United States, for the Eastern District of Washington

---

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The Circuit Court of Appeals has jurisdiction of the instant case under the provisions of Title 28, Sections 1291 and 2255, United States Code.

STATEMENT OF THE CASE

On or about July 2, 1948, the appellant, F. E. Nemec, was convicted by jury in the District Court of the United States for the Eastern District of Washington, Northern Division, on four counts of criminal violations against the United States. The gist of the counts was that the appellant Nemec, and others, had de-

frauded numerous Washington investors by the sale of mining claims in California through false and fraudulent representations and promises.

Appellant Nemec was sentenced on July 2, 1948, to a term of two years on Count I, the conspiracy count; a term of one year on Count II, the mail fraud count; a term of one year on Count IV, a Securities and Exchange Act count; and a term of one year on Count V, a Securities and Exchange Act count; imprisonment on Counts I, II, and IV to run consecutively—a total of four years; imprisonment on Count V to run concurrently with the sentences on the other counts. Count III was dismissed by the Court during the trial and is not involved in this appeal.

Appellant Nemec appealed his conviction to the United States Circuit Court of Appeals for the Ninth Circuit. By opinion dated December 14, 1949, in case No. 11975, the Circuit Court affirmed his conviction. The opinion of the Court is reported in 178 F. (2d) 656, No. 4. Petition for certiorari to the United States Supreme Court was denied on June 5, 1950.

On the 9th day of October, 1950, the appellant filed with the Clerk of the District Court for the Eastern Disrict of Washington, a Motion to Vacate Judgment and Sentence (Tr. 14). This motion was denied by the Court on December 9, 1950 (Tr. 27). It is from this order denying said motion that the present appeal is taken.

APPELLANT NEMEC'S ASSIGNMENTS OF ERROR

Appellant sets forth several assignments of error predicated upon the refusal of the trial court to grant his Motion to Vacate Judgment and Sentence. The trial court considered and rejected the several contentions made by the appellant in his motion. These sev-

eral contentions have been designated by appellant as his assignments of error and, together with the argument of appellee, are:

ARGUMENT

1. Answer to appellant Nemec's assignment of error, viz., that the indictment here involved did not sufficiently charge the commission of an offense, or offenses.

Appellant, before trial, interposed a demurrer to the indictment with which he was charged. One of the grounds of that demurrer was that the indictment did not charge the commission of an offense, or offenses. The demurrer was formally overruled by the District Judge. The appellant did not challenge the sufficiency of the indictment in his appeal to the Circuit Court on the judgment and conviction, nor did he allege error in his appeal based upon the overruled demurrer. Appellant was at all times during the trial, and afterwards on appeal, represented by able counsel. Since the sufficiency of the indictment was not earlier challenged on the original appeal to the Circuit Court, appellee believes that the Circuit Court should decline to consider it now. It is the position of the appellee herein that the indictment constituted a full and sufficient charge of the alleged crimes therein contained and that appellant's failure to challenge the indictment on his appeal from this conviction is proof of that sufficiency.

2. Answer to appellant Nemec's assignment of error, viz., that he was twice convicted and sentenced on the same offense, inasmuch as the conspiracy count and the substantive counts of the indictment alleged substantially the same offense and intent and were supported by the same evidence.

It has been well established that conspiracy is a crime separate from substantive crimes and may be prosecuted with the latter. *United States v. Freeman,* 167 F. (2d) 786. The conspiracy count covered the period from January 1, 1945, to the date of the indictment, May 6, 1948, and all of the substantive counts were alleged to have been committed within that period. It is the position of the appellee that these substantive counts were committed in furtherance of the continuing conspiracy, and, therefore, the same evidence could be used to support both. *Nye & Nisson v. United States,* 168 F. (2d) 846. Therefore, the appellant's contention that the various counts were improperly supported by the same evidence has no weight. See also *Pinkerton v. United States,* 328 U. S. 640.

The contention of the appellant that he has been tried, convicted and sentenced twice on the same offense, inasmuch as the conspiracy count and substantive counts of the indictment allege substantially the same offense, is well answered in *Pinkerton v. United States, supra,* at page 643, wherein it was stated:

> "It has been long and consistently recognized by the court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established."

A conviction for the conspiracy may be had, though the substantive offense was completed. *Heike v. United States,* 227 U. S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter v. McClaughry,* 183 U. S. 365, 395. Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive counts. As stated in *Sneed v. United States,* 298 Fed. 911 at 913:

> "If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it."

In *Holmes v. United States,* 134 F. (2d) 125, cert. den., 319 U. S. 776, the court pointed out that a defendant could not complain of a conviction of violating a Securities Exchange Act and of using the mails to defraud, embraced in several counts, and of conspiracy to effect the scheme to defraud embodied in such counts, on grounds that through the conspiracy count he was twice convicted of the same offense, since conspiracy was a different offense from that charged in the other counts.

The several citations of authority submitted by the appellant on this point in his brief have been examined with care and are not in point. So far as the appellee has been able to determine, there is no conflict of opinion among the courts as to the application of double jeopardy, based on these counts, as would give the appellant aid or comfort.

> 3. Answer to appellant Nemec's assignment of error that Substantive Counts II and IV of the indictment were defective in that said counts failed to allege where the letters therein contained were posted.

Count II of the indictment, a mail fraud count, charged in part:

> "That on the 13th day of December, 1945, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this court the defendants, F. E. NEMEC and BONEWICZ X. DAWSON, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be sent and delivered, according to the directions thereon, by the Post Office establishment of the United States, a letter ad-

dressed to Mr. Henry L. Harris, 921 Snow, Richland, Washington."

Count IV, a Securities and Exchange count, charged in part:

> "The said defendants on or about the 9th day of November, 1946, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this court, did cause to be delivered by the mails of the United States, according to the directions thereon, a certain letter addressed to Robert L. and Catherine U. Alderson, Route No. 8, Yakima, Washington; the said letter having theretofore on or about the 8th day of November, 1946, been placed or caused to be placed by the said defendants in an authorized depository for mail matter to be sent or delivered by the Post Office establishment of the United States according to the directions thereon."

The letter involved in Count II was admitted as plaintiff's Exhibit No. 49, and the addressee, Henry L. Harris, testified as to his receipt of same through the United States mails at Richland, Washington, within the Eastern District of Washington, on or about the date alleged in the indictment. The letter involved in Count IV constituted plaintiff's Exhibit No. 63, and the addressee, Robert L. Alderson, testified to its receipt through the United States mails at Yakima, Washington, within the Eastern District of Washington, on or about the date alleged in the indictment.

The crux of appellant's contention appears to be that the mailings on which these counts are based were defective in that the letters were not posted within the Eastern District of Washingon.

The material part of Section 338, Title 18 of the Criminal Code on which the above counts were based reads in substance as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . shall, for the purpose of executing such scheme or artifice . . . place, or cause to be placed, any letter . . . in any postoffice, . . . or authorized depository for mail matter, to be sent or delivered, . . . *or shall knowingly cause to be delivered by mail according to the direction thereon* . . . any such letter, . . . shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

It is patently apparent from the above that Congress plainly intended that the district within which the letter was caused to be delivered according to the directions thereon would have jurisdiction under the above section. The indictment, as to these two counts, followed the wording of the statute in this regard.

The contention of the appellant is disposed of in *Salinger v. Loisell,* 265 U. S. 224, 234, where the precise point upon which appellant relies was directly answered by the United States Supreme Court. In the above case the court held unequivocally that the government could prosecute for the unlawful use of the mails to perpetrate a scheme ~~of~~ or artifice, either in the District where the letter was mailed or in the District where the letter, according to its address, was delivered.

CONCLUSION

Appellee respectfully urges that the trial court committed no error in denying appellant's Motion to Vacate Judgment and Sentence, and appellee respectfully urges that the petition of appellant Nemec herein be denied.

Respectfully submitted,

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN,
Assistant United States Attorney
Attorneys for Appellee